Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

WALTER DEERING, as personal representative of the estate of Reinhold Deering,

Petitioner,

v.

JAMES M. REICH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Brian C. Hough, Esq.
Robinson Law Firm
103 East College Avenue
Appleton, WI 54911
(920) 731-1817

Alan T. Tarnowski, Esq.
Counsel of Record
Robinson Law Firm
103 East College Avenue
Appleton, WI 54911
(920) 731-1817

Attorneys for Petitioner

33

QUESTION PRESENTED FOR REVIEW

Whether the reasonableness of an officer's use of force can be properly analyzed when the plaintiff is prohibited from eliciting evidence concerning the petty, non-violent nature of the crime and the court instructs the jury to disregard the circumstances supporting the misdemeanor arrest warrant which the officer was attempting to execute on the victim during early morning hours?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is set forth in the Appendix, Exhibit 1; its docket number is 98-2560. It is dated July 1, 1999. It is a published decision which has not yet been reported. The final judgment of the U.S. District Court for the Eastern District of Wisconsin was entered June 8, 1998. It was not reported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on July 1, 1999. This Petition was filed within 90 days of July 1, 1999. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) The **Fourth Amendment** to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(2) **42 U.S.C. § 1983** provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Overview.

Petitioner Walter Deering, personal representative of the estate of the decedent, Reinhold Deering, (hereinafter, the plaintiff), went to trial to prove that police officer James Reich (hereinafter, Defendant Reich or Reich) acted unreasonably when he shot Reinhold Deering to death. During the trial, the plaintiff was precluded from presenting the jury with evidence about the petty, non-violent events leading to the attempted arrest of Mr. Deering during the early morning hours. The Court instructed the jury that the reasons for issuing the arrest warrant for Mr. Deering were irrelevant, and that the warrant did not have to be served at any particular time of day.

Mr. Reich prevailed at trial. The Court of Appeals held that although the trial court erroneously restricted evidence regarding the nature of the crime and erroneously instructed the jury to not consider such evidence, facts and circumstances known to the officer about the crime his victim allegedly committed were not required for a fair trial.

B. Facts.

Shawano County, Wisconsin officers James Reich, Michael Wizner and Paul Schnasa went to Mr. Deering's Oconto County, Wisconsin farm house at 12:45 in the morning to serve sixty-nine year old Reinhold Deering with an arrest warrant for his failure to appear in court on misdemeanor charges. The misdemeanor charges were filed against him because he allegedly tipped over someone's parked motorcycle with his vehicle.

Despite the non-violent nature of the underlying offense, the Shawano County officers put on their bulletproof vests and ventured into Oconto County in three separate squad cars to arrest the elderly man. At about 12:45 a.m., as they drove down the long, dark, driveway leading to the Deering farmhouse, they each turned off their headlights. The three parked out of sight and crept behind the house. An officer began banging on the back door. It should have come as no surprise that this startled the sixty-nine year old, who allegedly came to the door with a single-shot shotgun and repeatedly asked who was there. The officers scattered into the darkness.[1]

Officer Wizner says he emerged from behind a wall and told Mr. Deering to put down his gun. Wizner claims Mr. Deering came out and fired at Wizner, but missed. Reich

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[1] Mr. Reich testified that the officers identified themselves and that they hid because they saw Mr. Deering with a gun. These facts are disputed.

claims that as Mr. Deering was later walking back towards his back door, Reich emerged from his concealment behind a shed and aimed his gun at Mr. Deering. Reich claims he yelled at Mr. Deering and beamed a flashlight on him. Reich claims that the sixty-nine year old spun around and pointed his empty gun at Reich. Reich then blasted eleven shots at Mr. Deering. Mr. Deering died of two bullet entrance wounds to his back and an exit wound to his stomach.

The only witness to the killing of Reinhold Deering was Defendant Reich. The other two officers claimed they did not see anything.

Under 42 U.S.C. § 1983, the plaintiff filed a Complaint in the Eastern District of Wisconsin alleging, among other things, that Defendant Reich used unreasonable force against Reinhold Deering in violation of his Fourth Amendment rights. A trial was conducted on the unreasonable force claim. During the trial, the plaintiff attempted to elicit evidence regarding the underlying crime which compelled the officers to sneak up on the elderly Mr. Deering in the middle of the night. For example, when Plaintiff's counsel tried to ask Mr. Reich whether he knew that the warrant for the arrest of Reinhold Deering "had something to do with minor damage to a parked motorcycle", the trial court sustained the defendant's relevance objections. When plaintiff's counsel wanted to ask whether he knew the warrant he was executing was a misdemeanor warrant, the trial court instructed counsel that that question could not be asked on relevance grounds. At the close of the case, the court told the jury, "the reasons for issuing the warrant for Reinhold Deering's arrest are irrelevant" and that the "warrant did not require service at any particular time of day or night". The jury then found that shooting the sixty-nine year old in the back at 12:45 a.m. was reasonable under the Fourth Amendment to the United States Constitution.

A timely notice of appeal and appeal was filed with the Seventh Circuit, which affirmed on a 2 - 1 vote. (App.). The majority concluded that although the trial court erred in excluding the facts and circumstances relating to the arrest warrant, and erred in instructing the jury to disregard the reasons for issuing the arrest warrant, a new trial was not necessary. (App. 10 - 13). The dissent explained that the jury had a duty to assess all the facts and circumstances surrounding the confrontation in order to determine if the force used was reasonable. (App. 15). The excluded evidence spoke directly to the issue of how a reasonable officer would have assessed and then handled Mr. Deering's reaction to being awakened in the dead of the night. Id. The dissent concluded that by unduly restricting the information available to the jury, when combined with the district court's specific instruction to the jury to not consider the reasons for issuing the warrant, coupled with the instruction that the warrant could be executed at any time, the plaintiff was deprived of a fair trial. (App. 15 - 16).

This case presents an issue that bears upon all excessive force cases. The Court is asked to clarify that a jury cannot objectively analyze the reasonableness of an officer's use of force when the jury is precluded from considering that the officer knew that the elderly man he roused from his sleep and shot to death was wanted for a petty, non-violent matter.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE COURT'S REASONABLENESS TEST.

In a deadly force case, the question is whether the totality of the circumstances justified a particular sort of seizure. Tennessee v. Garner, 471 U.S. 1, 8-9; 85 L.Ed.2d 1; 105 S.Ct. 1694 (1985). In Graham v. Connor, the Court explained that the test is one of reasonableness. Graham v. Connor, 490 U.S. 386, 396; 104 L.Ed.2d 443, 455; 109 S.Ct. 1865 (1989). Although "reasonableness" is not capable of precise definition, "its proper application *requires* careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue". Id. (Emphasis added). Furthermore, in determining whether the force used was reasonable, a careful balancing is required of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests'" against the countervailing governmental interests at stake. Id.

In the present case, the plaintiff was precluded from eliciting testimony about the pettiness of the underlying crime at issue, and the trial court even instructed the jury to disregard the reasons underlying the arrest warrant. Thus. the jury was precluded from to considering "the countervailing governmental interests at stake" when assessing the reasonableness of shooting Mr. Deering in his back when he was merely accused of tipping over a parked bike. The Seventh Circuit affirmed. These rulings conflict directly with the Court's ruling in Graham.

As Graham makes clear, reasonableness is gauged objectively. Id. A jury cannot objectively evaluate reasonableness without knowing what the defendant officer

knew at the time of the use of force. In this case, Defendant Reich put on a bulletproof vest knowing that it was 12:45 a.m., that Mr. Deering was an elderly man living in a different county, that he and his fellow officers had approached his rural farmhouse with their headlights off, that they had hid their cars, that they had banged on Mr. Deering's back door, that Mr. Deering was retreating, *and that Mr. Deering was wanted for failure to appear on charges that he tipped over a parked motorcycle*. A reasonable officer on the scene would have considered each of these factors when he assessed whether or not to shoot the retreating Mr. Deering through his back. Proper application of the objective reasonableness test **required careful attention** to every one of these facts. See Id. The reasonableness of the officer's conduct was not properly evaluated in the present case, and the plaintiff did not receive a fair trial.

Certainly, if a man had walked into a shopping mall and started shooting everyone in sight, and the next day Reich, Schnasa and Wizner were trying to arrest him, the severity of the crimes would be a crucial circumstance known to the officers concerning the reasonableness of any decision to pull the trigger. Indeed, it would be a clear error of law if the jury were precluded from considering the severity of the underlying crimes. For the same reasons, since Mr. Deering was accused of petty, non-violent offenses, such information must be considered in the analysis of the objective reasonableness of the use of force.

It must be remembered that there were only two witnesses to the shooting. One witness was Defendant Reich. The other witness was Reinhold Deering who Defendant Reich shot to death. No one is alive to tell the story but the accused. Thus, during the trial, Plaintiff called into question the credibility of Reich's self-serving story that he had to shoot Mr. Deering because Mr. Deering was pointing a gun at

him; a remarkable proposition, considering Mr. Deering was shot through his back. The jury was free to reject this.

Rather than limit the jury to Defendant Reich's self-serving testimony about how the shooting took place, in order to properly evaluate the objective reasonableness of the use of deadly force, the jury needed to know not only what the officer said happened, but the objective facts concerning what the officer in fact knew about the victim. These facts *must* be assessed in determining whether a reasonable officer would have pulled the trigger eleven times. As illustrated above, Graham says in concrete terms that proper application of the reasonableness test requires analysis of the severity of the crime.

Had the lower court applied the proper reasonableness test, the jury would have been told that Reich knew the sixty-nine year old was simply wanted for tipping over a parked bike, a misdemeanor offense. From this, the jury could have concluded that a reasonable officer would have known that creeping around the back of the elderly man's rural farmhouse at 12:45 a.m. and banging on his back door put Mr. Deering in fear of his life. A reasonable officer would have known that Mr. Deering was reacting in a defensive manner; that is, he did not want to hurt anyone.

After all, according to Defendant Reich, Mr. Deering was retreating towards his door when Mr. Reich emerged from concealment with his gun trained on him. An objectively reasonable officer would have had to consider whether to kill under these circumstances, or remain in concealment until Mr. Deering finished retreating back to bed. In light of the totality of the circumstances known, a reasonable officer would not have shot to kill, while Mr. Reich decided to spray eleven rounds of gunfire at the man's back and kill him. Thus, since the jury was told to disregard

the reasons for the arrest, the jury was deprived of information from which it could conclude that Mr. Reich should have known that Mr. Deering was not a threat. The trial was flawed, and the Court of Appeals should have concluded that evidence concerning the severity of the crime was required to properly analyze reasonableness. The Petition should be granted so the Court can reverse the Seventh Circuit decision and order a new trial.

II. THE PETITION SHOULD BE GRANTED TO RESOLVE CONFUSION AMONG THE CIRCUITS AS TO WHAT THE TEST FOR REASONABLENESS IS.

The Petition should be granted to provide additional guidance on the test of reasonableness. The circuits' views of the reasonableness test vary. Some circuits have ruled that the test must exclude what they call "preseizure" facts, such as the severity of the crime at issue.

For example, in Abraham v. Raso, the Third Circuit "expressed its disagreement with those circuit courts which have held that analysis of 'reasonableness' under the Fourth Amendment requires excluding any evidence of events preceding the actual 'seizure'." Abraham v. Raso, (Appeal Nos. 98-5405 & 98-5406) _____ F.3d ____ (3rd Cir. 1999). The Third Circuit cited Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993) in which the Eighth Circuit stated, "we scrutinize only the seizure itself, not the events leading to the seizure". The Third Circuit also relied on Bella v. Chamberlain which quoted Bone as well as Carter v. Buscher, 973 F.2d 1328, 1332 (7th Cir. 1992), for the proposition that pre-seizure conduct is not subject to Fourth Amendment scrutiny. Bella v. Chamberlain, 24 F.3d 1251, 1256 (10th Cir. 1994). In Bella, the Tenth Circuit stated that it should not examine an officer's actions leading up to the

seizure in determining whether the seizure was reasonable. Id. Similarly, in Dickerson v. McClellan, the Sixth Circuit "limited the scope of [its] inquiry to the moments preceding the shooting". Dickerson v. McClellan, 101 F.3d 1151, 1162 (6th Cir. 1996).

But in Rowland v. Perry, the Fourth Circuit stated,

> "The better way to assess the objective reasonableness of force is to view it in full context, with an eye towards the proportionality of the force in light of the circumstances. Artificial divisions in the sequence of events do not aid the court's evaluation of objective reasonableness."

Rowland v. Perry, 41 F.3d 167, 173 (4th Cir. 1994).

Clearly, it would be of great nationwide benefit for the Court to clarify the test for reasonableness. In Abraham, the Third Circuit artfully pointed out the problems in the current state of the law when it explained:

> "We reject the reasoning of Bone, Carter, and Bella because we do not see how these cases can reconcile the Supreme Court's rule requiring examination of the 'totality of the circumstances' with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished. 'Totality' is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force."
>
> A more fundamental point is that it is far from clear what circumstances, if any, are left to be

> considered when events leading up to the shooting are excluded. How is the reasonableness of a bullet striking someone to be assessed if not by examining the preceding events? . . .
>
> *". . . [C]ourts are left without any principled way of explaining when 'pre-seizure' events start and, consequently, will not have any defensible justification for why conduct prior to that chosen moment should be excluded."*

Abraham v. Raso, (Appeal Nos. 98-5405 & 98-5406) ____ F.3d ____ (3rd Cir. 1999)(emphasis added).

The Court should grant the petition so that it can clarify that the proper test of reasonableness requires an analysis of the *totality* of the circumstances presented to the officer, whether they occur before the seizure or during, so long as they bear upon the objective reasonableness of the degree of force used. Proper application of the test includes an analysis of the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Court should grant the Petition for a Writ of Certiorari so that it can reverse the Seventh Circuit decision, and order that the Plaintiff - Petitioner be given a new trial against Respondent Reich.

Dated this 24th day of September, 1999.

ROBINSON LAW FIRM

Brian C. Hough
WI State Bar No. 1025056

103 E. College Avenue
Appleton, WI 54911
(920) 731-1817
(920) 731-0050 (fax)

ROBINSON LAW FIRM

Alan T. Tarnowski
WI State Bar No. 1004012
Counsel of Record
103 E. College Avenue
Appleton, WI 54911
(920) 731-1817
(920) 731-0050 (fax)

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In the
United States Court of Appeals
For the Seventh Circuit

No. 98-2560

WALTER DEERING, as personal representative of the estate of Reinhold Deering,

Plaintiff-Appellant,

v.

JAMES M. REICH, PAUL D. SCHNASA, MICHAEL J. WIZNER, each in their individual capacities and official capacities as police officers for the County of Shawano, and THE COUNTY OF SHAWANO,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 96-C-1244—**Charles N. Clevert**, *Judge*.

ARGUED DECEMBER 10, 1998—DECIDED JULY 1, 1999

Before POSNER, *Chief Judge*, and RIPPLE and EVANS, *Circuit Judges*.

EVANS, *Circuit Judge*. Sixty-nine-year-old Reinhold Deering was awakened at his home in the middle of the night and, through a series of unfortunate events, was shot to death by a deputy sheriff serving an arrest warrant arising out of Deering's failure to appear in court in connection with a misdemeanor case in Shawano County, Wisconsin. It was an altogether tragic event. The primary

EXHIBIT 1
APPENDIX

issue before us is whether certain alleged errors at the trial of a civil suit (under 42 U.S.C. § 1983) growing out of the incident warrant setting aside the verdict of a jury, which found that Deering's constitutional rights were not violated.

Deering lived alone on a farm in Oconto County, Wisconsin, just over the border from Shawano County. At some point in his life he was committed to a mental institution, and during the months preceding his death he was acting abnormally. For example, one day while he was in Shawano County he backed his vehicle into a parked motorcycle, tipping it over. Although the owner of the motorcycle was willing to settle the dispute if he was paid a few dollars for the gasoline which leaked out of the cycle, Deering was unwilling to pay. As a result of the incident, Deering was charged with misdemeanor property damage. On January 31, 1995, after Deering failed to attend his initial appearance on the charge, a bench warrant for his arrest was issued. Many hours later, around 11 o'clock in the evening, three Shawano County deputy sheriffs—Michael Wizner, Paul Schnasa, and James Reich—met in their dispatch center and, despite the lateness of the hour, decided to arrest Deering on the warrant. Just before they arrived at Deering's farm, which as we said was in the neighboring county, Deputy Wizner notified the Oconto County sheriff's department that they were coming into Oconto County to serve the warrant. The Oconto County sheriff's department acknowledged this communication by stating "10-4."

Wearing bulletproof vests, the deputies went to the farm in separate squad cars, arriving around 12:45 a.m. on February 1. Approaching the farmhouse, they turned off the lights of their squad cars and parked out of sight. On foot, they sneaked up to the house and looked in. Through the window of a bedroom, which was dimly lit, Reich and Wizner saw Deering sleeping in his bed. Schnasa knocked on the back door. Deputy Reich saw Deering get out of bed, go to the back door, look out, and say "Who's there?" The

officers identified themselves. According to them, Deering said something like "Goddamn Sheriff's Department." The next thing Schnasa saw was the barrel of a shotgun or a rifle. It turned out to be Deering's 16-gauge, single-shot shotgun. Deputy Reich also saw the weapon, and both officers yelled "gun."

Deputy Schnasa ran to the squad to radio for assistance; the other two deputies sought cover, with Wizner running to the northwest corner of the house and Reich to a shed. Because it was the middle of the night and fairly dark in the yard, Wizner shined a flashlight on Deering, telling him to "drop the gun." Wizner testified that Deering moved away from the house into the yard. Next, Wizner says, Deering turned and fired a shot in his direction. Wizner, incorrectly it turns out, thought he was hit.

Deputy Reich could not see Deering but, hearing the commotion, he moved forward and drew a bead on Deering. At this time, Deering was in a part of the yard which was now partially illuminated by a yard light. Reich said he believed that Wizner had been hit. Reich shined his flashlight on Deering. He thought that Deering was facing towards him with the shotgun at his shoulder. Reich yelled at Deering to put the gun down. He then fired 11 rounds at Deering, killing him when 2 of the shots hit him in the back.

Walter Deering, the personal representative of Reinhold Deering's estate, filed the present case, pursuant to 42 U.S.C. § 1983, alleging that Reich used unreasonable force against Reinhold Deering; that Deputies Schnasa, Wizner, and Reich deprived Deering of his due process rights by the manner in which they attempted to arrest him; and that Shawano County had policies, customs, and practices which caused the deprivations of Deering's constitutional rights. All of the claims, except the excessive force claim against Reich, were dismissed on the defendants' motion for summary judgment. A trial was held on the claim against Reich, and the jury returned a verdict in his favor.

One of the issues raised on this appeal is a nonstarter: Deering claims that Reich "was acting as a private citizen, as opposed to police officer, when he killed Mr. Deering" because he pulled the trigger in Shawano, not Oconto, County. For Fourth Amendment purposes, however, Reich was acting as a law enforcement officer (i.e., under color of law) when he was at Deering's farm, and it is the reasonableness of his conduct, not compliance with whatever geographical boundaries Wisconsin sets for its counties, that determines violations. We might have a different case if Reich, to settle some personal score, was on a purely private mission to kill Deering. That's obviously not the case here. And besides, we're not all that certain that the deputies even violated the state statute upon which Deering relies (59-28 Wis. Stat., a colorful law that authorizes sheriffs to "quiet and suppress all affrays, routs, riots, unlawful assemblies and insurrections" in their counties) when they informed the sheriff's department in Shawano of their mission and, from the record here, heard no objection to their quest.

We now move to the main cluster of arguments on this appeal, which centers on related jury instructions and evidentiary rulings, involving how to evaluate whether Deputy Reich's firing at Deering was reasonable under the totality of the circumstances. The arguments swirl around a number of questions. The arguments concern whether the deputies had an obligation to use all feasible alternatives to avoid a situation such as the one which developed here and the role what has been called "preseizure" conduct plays in the analysis of Fourth Amendment claims.

Essentially claiming that the jury instructions improperly limited what the jury could consider, rather than permitting consideration of the totality of the circumstances, Deering objects to certain statements in the instructions. One is that "[t]here is no requirement that police officers use all feasible alternatives to avoid a situation where deadly force can justifiably be used." Other objections are found in the following sentences:

> [i]n considering the circumstances in this case, you are instructed that the reasons for issuing the warrant for Reinhold Deering's arrest are irrelevant. You are further instructed that the warrant did not require service at any particular time of the day or night.

Perhaps with an eye on the totality of the circumstances, the trial judge allowed some background testimony from Deputy Wizner about the incident giving rise to the complaint against Deering. There was testimony that Deering's car, while moving out of a parking space, bumped into a motorcycle, tipping it over and causing minor damage. Objections were sustained to questions about the owner of the motorcycle being willing to resolve the matter informally by having Deering pay for the gasoline which was spilled. In addition, objections were sustained to questions put to Deputy Reich about what he knew: about whether the complaint "had something to do with minor damage to a parked motorcycle" and about the fact that the warrant was for a failure to appear. In response to repeated objections, the judge ruled that the nature of the charge underlying the warrant (a misdemeanor) was irrelevant because the basis of the charge and the reasons for issuing the bench warrant were "preseizure" activity and thus not germane to an analysis of whether Reich's firing at Deering was reasonable, although the fact that the deputies had a warrant was, of course, admissible.

It is troubling to us that the instructions and the evidentiary rulings take a rather restrictive view of what constitutes the totality of the circumstances. As the instructions properly note, the reasonableness of Reich's shooting of Deering must be judged by the totality of the circumstances. The question is, "what circumstances"? Or, using the defense phrasing, what is "seizure" conduct and what is "preseizure" conduct? Where, in other words, are the boundaries of the totality of the circumstances?

The totality of the circumstances cannot be limited to the precise moment when Deering discharged his weapon. That Deering fired a shot is a very important factor; per-

haps the jury could easily conclude that it was the controlling factor, but it is not the only relevant factor, in evaluating the constitutionality of Reich's response, which as we have noted was to discharge 11 rounds of ammunition in Deering's direction. If Deering's firing a shot were the only factor, we would hardly need a trial. And, in fact, the trial judge did not take this extreme view; testimony was not limited to the shooting alone. Some evidence was admitted about matters that occurred prior to the shooting as part of the "totality of the circumstances," a phrase which, in itself, ordinarily gives law enforcement officers a good deal of discretion. In fact, the phrase is most often used to provide justification for police action; usually the totality of the circumstances encompasses some fact or another which validates a search, a seizure, or such things as the reasonableness of force used to carry out an arrest. It includes information which the officer had at the time of his actions, but not information uncovered later. *See Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988) (*en banc*).

So, in the present case, does the totality of the circumstances include, for instance, the fact that the deputies decided to serve the warrant in the middle of the night on an elderly man living alone in a rural farmhouse? Deputy Reich calls such information immaterial "preseizure" conduct. He points out that in *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992), we said that "pre-seizure conduct is not subject to Fourth Amendment scrutiny."

In *Carter*, relying on *Brower v. County of Inyo*, 489 U.S. 593 (1989), we indicated that the proper inquiry is whether the force used was reasonable in the totality of the circumstances, not "whether it was reasonable for the police to create the circumstances." At 1331. Reading *Carter* in the context of other cases, however, we think the most that can be said, for purposes of our case, is that *Carter* reinforces the concept, which we will discuss later, that the deputies did not need to consider all feasible alternatives in serving the warrant on Deering. But that is not the

same as saying that any specific alternative is per se reasonable.

Excessive force claims, including deadly force claims, resulting from a seizure are analyzed under the Fourth Amendment's objective reasonableness standard. *Graham v. Connor*, 490 U.S. 386 (1989). Reasonableness depends on the information the officer possesses prior to and at the immediate time of the shooting; the "knowledge, facts and circumstances known to the officer at the time he exercised his split-second judgment as to whether the use of deadly force was warranted." *Sherrod*. Reasonableness is evaluated from the officer's perspective at the time, not with 20/20 hindsight. *Graham*. What Deputy Reich knew about Deering and the basis for the warrant would seem to fall within these parameters. After all, we can only assume police do not approach the arrest of a jaywalker and a cop killer in the same fashion.

In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court considered the constitutionality of a Tennessee statute which authorized the use of deadly force against an unarmed, nondangerous fleeing suspect. In finding the statute unconstitutional, the Court specifically rejected the idea that the Fourth Amendment has nothing to say about how a seizure is made. Rather, in language which is cited over and over, the Court said that in order to determine the constitutionality of a seizure, one must "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." At 8, quoting *United States v. Place*, 462 U.S. 696, 703 (1983). In the balancing, "it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out." 471 U.S. at 8.

Decided a few years later, *Brower* involved a roadblock consisting of an 18-wheeler set up across a 2-lane road out of sight around a curve with the headlights of a police car trained on the approach so as to blind an oncoming driver. Brower, a fleeing suspect, slammed into the roadblock. The

primary issue in the case was whether the driver's death constituted a seizure, and the unanimous conclusion was that it did. But the issue remained as to whether the seizure was reasonable. On remand, the Court of Appeals for the Ninth Circuit assumed the high-speed chase which preceded the crash into the roadblock arguably constituted as a matter of law a substantial threat to the officers which would justify the use of deadly force. Nevertheless, the court said,

> [T]here remains the question whether such force was necessary to prevent the escape. Necessity is the second prerequisite for the use of deadly force under *Garner*. The necessity inquiry is a factual one: Did a reasonable non-deadly alternative exist for apprehending the suspect?

Brower v. County of Inyo, 884 F.2d 1316, 1318 (9th Cir. 1989). Applied to our case, both the time and manner of the execution of the warrant are part of the totality of the circumstances.

Another question in our case is whether the nature of the underlying crime—the basis for the warrant—is relevant. *Graham v. Connor*, 490 U.S. 386 (1989), the case from which many of the jury instructions in the present case were taken, answers the question. It clearly says that a determination of reasonableness requires a careful balancing of the nature of the intrusion against the governmental interests at stake. The proper application of the reasonableness standard requires consideration of a number of factors known to the officers at the time, including the nature of the underlying crime. It requires

> careful attention to the facts and circumstances of each particular case, *including the severity of the crime at issue,* whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

At 396 (emphasis added).

Estate of Starks v. Enyart, 5 F.3d 230 (1993), involved both the issue of the underlying crime and the relevance of the police conduct. Considering both issues in the context of an officer's claim of qualified immunity from suit, we said that an officer may use deadly force "only to seize a fleeing felon who has committed a violent crime or who presents an immediate danger to the officer or others." Recognizing that officers may use deadly force to protect themselves "even after choosing a risky course of action," we nevertheless found it relevant to the analysis that the officers knew "that the underlying crime was not accomplished violently." At 233. Again we pointed out that it is necessary to balance the intrusion with the countervailing governmental interests at stake. In the context of fleeing felons, what that meant to us was the not very revolutionary idea that deadly force is allowed against violent fleeing felons in part because they have forfeited the right to a less intrusive seizure and that fleeing felons who have not resorted to violence have a right to less intrusive seizures. But we continued:

> If a fleeing felon is converted to a "threatening" fleeing felon solely based on the actions of a police officer, the police should not increase the degree of intrusiveness. In other words, we have no countervailing governmental interest in unreasonable police conduct that would justify a greater intrusion on the individual's rights.

At 234.

A further sampling of our cases illustrates our usual view of totality of the circumstances. In *Jaffee v. Redmond*, 51 F.3d 1346 (7th Cir. 1995), Officer Mary Lu Redmond responded to a report of a fight at an apartment complex. When she arrived at the scene, Ricky Allen was chasing and poised to stab another man with a butcher knife. Because a person's life was in danger, Redmond fired, killing Allen. A jury awarded Allen's surviving family members $545,000. Although we remanded the case for a new trial

on other grounds,[1] we approved an instruction which said that the jury should consider "all the facts and circumstances with which Mary Lu Redmond was confronted." In *Plakas v. Drinski*, a deputy sheriff was confronted with a man menacing him with a fireplace poker and threatening him with death. The deputy shot and killed the man. In evaluating the district court's grant of summary judgment, relying on *Tom v. Voida*, 963 F.2d 952 (7th Cir. 1992), we said that in determining reasonableness, we "carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage." 19 F.3d at 1150.

These cases—and others too numerous to relate—mean that what Deputy Reich knew at the time—about Deering, his crime, and the warrant, and his perception of the danger he and the other deputies were in—was relevant to the evaluation of the reasonableness of his conduct. In addition, the balancing required by *Garner* requires a look at the countervailing governmental interest in serving the warrant on Deering, which would include the time and manner in which it was served. Finally, of course, all of the events that occurred around the time of the shooting are relevant. In other words, the totality of the circumstances is what must be evaluated. When a case is tried to a jury, the evaluation of those circumstances must be left to that jury.

In our case, the trial judge came very close to improperly restricting what the jury could consider. Objections were sustained to some questions regarding the events giving

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[1] Certiorari was granted in the case on the other ground, which was whether a privilege protects confidential communications between psychotherapists and their patients. Our decision that it does was affirmed. *Jaffee v. Redmond*, 114 S. Ct. 1923 (1996). When the case was retried, Jaffee again prevailed on her civil rights claim to the tune of $100,000. See our decision on attorney fees at 142 F.3d 409 (7th Cir. 1998).

rise to the warrant. Despite that, however, the jurors heard evidence about the incident with the motorcycle, which would allow them to understand that the deputies were not looking for a serial murderer when they went to the farmhouse. The jury also heard testimony regarding how the deputies approached the house, how dark it was, what Deering's response was. They were allowed to hear sufficient information about the situation. Because the jury knew in general about the totality of the circumstances, the fact that they did not hear that the warrant was based on a misdemeanor is not reversible error—though we fail to see why this fact was kept from the jury. The jury, we conclude, had a sufficient basis on which to evaluate Reich's response to Deering's firing the shot. Indeed, it is hard to imagine that any prior circumstances would cause the jury to fail to focus on the fact that Deering fired at the deputies. The evidentiary rulings, though a bit restrictive and for that reason troubling, do not, in our view, require a retrial of this hard-fought case.

We now turn to the jury instructions. As to the instruction regarding use of alternative methods of achieving law enforcement goals, it was not improper to tell the jury that the deputies did not need to use "all feasible alternatives" to avoid the situation which developed. Such a requirement would be an impossible straightjacket on law enforcement. We have stated:

> There is no precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used.

Plakas v. Drinski, 19 F.3d 1143, 1148 (7th Cir. 1994).

Two other brief sentences in the instructions are called into question. One said "the warrant did not require service at any particular time of day or night." This statement is true. Although this instruction can be understood to say that the jury could not consider the folly of serving this warrant in the middle of the night, that reading is not

required. The fact that a warrant can be served anytime does not mean that it is appropriate to choose any particular time.

The other instruction is very brief—"[i]n considering the circumstances in this case, you are instructed that the reasons for issuing the warrant for Reinhold Deering's arrest are irrelevant." In this case, we think that instruction was wrong. The reasons for issuing the warrant are part of the facts and circumstances known to Deputy Reich. And the fact that an instruction is brief does not mean that, in some circumstances, it cannot be lethal to a verdict.

But we must look to the instructions as a whole. *Smith v. Chesapeake & Ohio Ry.*, 778 F.2d 384 (7th Cir. 1985). When we do that we see that the jury was adequately informed that it was to consider the totality of the circumstances. The jury was told:

> Every person has the right not to be subjected to unreasonable or excessive force in the course of the duties performed by a law enforcement officer, even if the actions of the law enforcement officer are otherwise made in accordance with due process of law. On the other hand, in performing his lawful duties, an officer has the right to use such force as is reasonably necessary under the circumstances. Whether or not the force used was unreasonable is an issue to be determined in the light of all the surrounding circumstances on the basis of that degree of force a reasonable and prudent officer would have applied under the circumstances disclosed in this case.
>
> . . . .
>
> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. With respect to a claim of excessive force, the standard that applies is reasonableness under [the]

> totality of the circumstances existing at that moment. Under the circumstances refers only to those circumstances known and information available to the officer at the time of his action. The calculus of reasonableness must embody allowance for the fact that a police officer is often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

These instructions tell the jury that they must consider all the circumstances and the information available to the officer at the time. The instructions viewed as a whole allow a consideration of what Reich knew about Deering as well as what the situation was at the moment he fired. Although the specific sentence we have quoted was, under the facts of this case, a misstatement, taken in context of the instructions as a whole we find that it does not require a retrial of this case. A trial is not required to be perfect—in fact, most often it cannot be. *See United States v. Green*, 786 F.2d 247 (7th Cir. 1986). This was not a perfect trial but, all things considered, we are not moved to conclude that it was blatantly unfair to either side.

Deering also raises objections to the testimony of Dr. Virginia Jordan Greenbaum, a forensic pathologist. Dr. Greenbaum did not perform the autopsy, but because of the illness of the person who did, she was allowed to testify for Deputy Reich pursuant to a stipulation. The stipulation said that her testimony would be limited to explaining the autopsy report, and Reich's counsel stated that she would not "testify that wound number three which is the upper wound was consistent with James Reich's firing of his firearm." But that is precisely what she testified to on redirect. Her testimony could not have more clearly violated the stipulation. However, Reich correctly points out that Deering opened the door to the testimony on cross-examination when Greenbaum was asked about the possible position of Deering when he was shot.

Deering's counsel elicited testimony that by looking at a wound track, one can determine the relative positions of the parties, but that, for instance, the relative positions are the same whether a shooter shoots someone standing facing him or whether the person is standing above a person who is lying on his back. The bullet travels perpendicular, front to back. Counsel then asked whether Deering could have been lying on his face on the ground when he was shot. Given that opening, counsel for Reich drove a tank through it on redirect, ultimately obtaining testimony that Deering's wound was consistent with his aiming a shotgun at the time he was killed. The questioning was invited, and we find no error on this point.

Mr. Deering also objects to Dr. Greenbaum's testimony as lacking foundation and as inadmissible under *Daubert*. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). We have recently been reminded again that our review of a decision to allow expert testimony is deferential. We review the trial court's decision about reliability of expert testimony for an abuse of discretion. *Kumho Tire Co. v. Patrick Carmichael*, ___ U.S. ___, 1999 WL 152455 (March 23, 1999); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). Dr. Greenbaum has been involved in autopsies on at least 75 bodies that have been subjected to bullet wounds. The admission of her testimony that the wound was consistent with a certain position was not an abuse of discretion. The judgment of the district court is AFFIRMED.

RIPPLE, *Circuit Judge*, dissenting. My colleagues correctly point out that, in order to make an informed decision regarding the objective reasonableness of the defendant's actions, the jury had the duty to assess all of the facts and circumstances surrounding the tragic confrontation. Because the jurors had this duty, they also had a right to know the relevant facts and circumstances that set the stage for the confrontation between the officers and Mr. Deering. The jury therefore was allowed to hear evidence regarding the timing and manner of the officers' approach to Mr. Deering's home, the reason for their visit and the geographical setting of Mr. Deering's home. As my colleagues also point out, it was relevant that the officers chose to show up at Mr. Deering's residence in the middle of the night; it was relevant that Mr. Deering was an elderly man living alone; it was relevant that he lived in an isolated farm house.

Given the permissible—and necessary—scope of the jury's inquiry, there is no principled reason for excluding evidence regarding the nature of the arrest warrant. By withholding this information from the jury and, indeed, affirmatively instructing the jury that such information was not relevant, the district court kept from the jury evidence that would have added to the jury's overall understanding of what the officers knew and how the officers conducted themselves that night. Evidence that the arrest warrant was for failure to appear in court on a misdemeanor charge was directly relevant in the jury's estimation of the reasonableness of the defendant's actions at the moment of the shooting. It spoke directly to the issue of how a reasonable officer would have assessed and then handled Mr. Deering's reaction to being awakened in the dead of night.

The ruling of the district court to exclude evidence of the nature of the arrest warrant unduly limited the jury's view of the totality of the circumstances surrounding the events that led to the shooting of Mr. Deering. In my view, this

restriction on the information available to the jury, when combined with the district court's specific instruction that the jury was not to consider the reasons for issuing the warrant and that the warrant could be executed at any time, deprived the plaintiff of a fair trial and requires reversal.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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No. 99-563

In The
Supreme Court of the United States

October Term 1999

WALTER DEERING,
As personal representative of the Estate of Reinhold Deering,

Petitioner,

v.

JAMES M. REICH,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES H. BOHL
Counsel of Record
NATHAN A. FISHBACH
JOHN P. SPECTOR
WHYTE HIRSCHBOECK DUDEK S.C.
111 East Wisconsin Avenue, Suite 2100
Milwaukee, WI 53202
(414) 273-2100
Counsel for Respondent

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

This action was brought pursuant to 42 U.S.C. § 1983 by Petitioner Walter Deering, in his capacity as personal representative of the estate of Reinhold Deering, for damages arising from the death of Reinhold Deering ("Deering"). The events in question occurred on the night of February 1, 1995, when Respondent James M. Reich, Paul D. Schnasa, and

Michael J. Wizner, officers employed by the Shawano (Wisconsin) County Sheriff's Department, attempted to serve an arrest warrant upon Deering. Shortly after Deputies Reich and Schnasa announced their presence at Deering's residence, Deering appeared at the door with a firearm. Deering subsequently fired a shot at Deputy Wizner. Moments later, Deering pointed his firearm at Deputy Reich and ignored Reich's command to drop his weapon. Reich then shot and killed Deering.

The Petitioner's Amended Complaint alleged that Reich had not acted reasonably in his use of deadly force against Deering, in violation of Deering's Fourth Amendment right to be free from unreasonable seizure.[1] A jury trial was held on June 1-8, 1998. The jury returned a verdict finding no liability on the part of Reich and awarding the Petitioner nothing as damages. Judgment on the verdict was entered on June 8, 1998.

On appeal, the Petitioner raised several issues before the United States Court of Appeals for the Seventh Circuit. One of these issues, and the only one presented to this Court in the Petition for Writ of Certiorari, concerns an evidentiary ruling made by the District Court during trial and a portion of the instructions given to the jury.

During trial, the District Court sustained Reich's

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1 Additional claims were asserted against Deputies Schnasa and Wizner and against Shawano County. These claims were dismissed by the District Court on summary judgment and all Defendants other than Reich were dismissed from the action. Only the Fourth Amendment claim against Deputy Reich was preserved for trial.

objections to the introduction of testimony concerning the nature of the crime (felony v. misdemeanor) supporting the arrest warrant that Reich was attempting to serve on Deering on the night in question. The District Court also instructed the jury that "the reasons for issuing the arrest warrant for Reinhold Deering's arrest are irrelevant." The District Court further instructed the jury that "the warrant did not require service at any particular time of the day or night."

Before the Seventh Circuit, the Petitioner argued that this evidentiary ruling and the content of the quoted jury instructions constituted reversible error requiring a new trial. Petitioner argued that these decisions rendered the jury incapable of assessing the "totality of the circumstances" surrounding the seizure of Deering.

The Seventh Circuit, in a decision dated July 1, 1999, held that the challenged evidentiary ruling, although a "bit restrictive and for that reason troubling," did not require a new trial. *Deering v. Reich*, 183 F.3d 645, 652 (7th Cir. 1999). The Seventh Circuit noted that the jury was permitted to hear evidence regarding the incident giving rise to the arrest warrant and the time and manner in which the deputies attempted to serve the warrant. *Deering*, 183 F.3d at 652. The court held that because the jury was permitted to hear "in general about the totality of the circumstances," the decision to exclude evidence concerning the misdemeanor nature of the crime charged in the arrest warrant was not reversible error. *Deering*, 183 F.3d at 652.

With respect to the portion of the challenged jury instruction stating that "the reasons for issuing the arrest warrant for Reinhold Deering's arrest are irrelevant," the

Seventh Circuit determined that this was a "misstatement" by the District Court. *Deering*, 183 F.3d at 653. However, the Circuit Court, after considering the jury instructions as a whole, held that the jury was properly instructed to consider the totality of the circumstances known to Reich at the time of the seizure. *Deering*, 183 F.3d at 653. The court held that "The instructions viewed as a whole allow a consideration of what Reich knew about Deering as well as what the situation was at the moment he fired." *Deering*, 183 F.3d at 653. Because the instructions as a whole properly informed the jury of the applicable law, the misstatement by the District Court was held not to require a retrial of the case. *Deering*, 183 F.3d at 653.

With respect to the portion of the challenged jury instruction stating that "the warrant did not require service at any particular time of day or night," the Seventh Circuit held that the statement was true and was not given in error. *Deering*, 183 F.3d at 653.

STATEMENT OF FACTS

On January 31, 1995, Shawano County (Wisconsin) Circuit Court Judge Thomas G. Grover issued a bench warrant for the arrest of Deering on the grounds that he failed to appear at an initial appearance on that date in State v. Deering, 95-CR-00001, a misdemeanor criminal case which was pending against him. (R. 36, Exh. H; R. 86 at 4.)[2] The warrant was transmitted to the Shawano County Sheriff's Department,

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2 The Respondent recognizes that the record has not yet been filed with the Court. Respondent will nonetheless support his factual recitations with citations to the record.

located in the City of Shawano, Wisconsin.

The crime with which Deering was charged was misdemeanor property damage stemming from an incident in which Deering backed his vehicle into a parked motorcycle, tipping it over. *Deering*, 183 F.3d at 648.[3]

Deputy Wizner commenced work at approximately 4:00p.m. on the evening of January 31, 1995. (Tr. 300.)[4] His shift was scheduled to end at 1:00 a.m. on February 1, 1995. (Tr. 302.) After he commenced his shift, Deputy Wizner reviewed the pending arrest warrants, including the warrant for Deering. (Tr. 300.) Subsequently, he traveled to Deering's residence to ascertain its location. (Tr. 301.)

At approximately 6:00 p.m. on January 31, 1995, Deputy Schnasa commenced his tour of duty. (Tr. 302.) He was scheduled to conclude his tour of duty at 3:00 a.m. on February 1, 1995. (Tr. 303.) At approximately 11:00 p.m. on January 31, 1995, Corporal Reich commenced his tour of duty. (Tr. 303.) He was scheduled to conclude his tour of duty at

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3 The Respondent objects to the Petitioner's references throughout the Petition to the allegation that he was precluded from introducing evidence of "the pettiness of the underlying crime." The Seventh Circuit specifically held that the jury "heard evidence about the incident with the motorcycle..." *Deering*, 183 F.3d at 652. What the jury was precluded from hearing was that the arrest warrant "was based on a misdemeanor." Deering, 183 F.3d at 652.

4 As used herein, citations to the Trial Transcript will be made as "Tr." followed by the page number.

8:00 a.m. on February 1, 1995. (Tr. 303.)

Sometime after 11:00 p.m., Corporal Reich, Deputy Schnasa, and Deputy Wizner met in the Dispatch Center and discussed the service of the pending warrants, including the one issued for Deering. (Tr. 319.)

At approximately 12:45 a.m. on February 1, 1995, Deputies Reich, Schnasa, and Wizner arrived at Deering's residence. (Tr. 322.) Deputy Schnasa knocked on Deering's door on the north (back) side of Deering's house. (Tr. 621-622.) Looking through a bedroom window at the back of the house, Corporal Reich saw Deering sleeping and told Deputy Schnasa to knock again louder. (Tr. 449, 342.) Corporal Reich then saw Deering get out of bed and travel to the door. (Tr. 456.) Corporal Reich told Deputy Wizner (who was standing on a pile of dirt between the back door and the bedroom window) to keep an eye on Deering since he (Deering) was going to the back door. (Tr. 449-450.) Corporal Reich then went to the porch in front of the door. (Tr. 457.)

Deering came to the door and the curtains on the door opened slightly. (Tr. 623.) Deering said words to the effect of "Who's there?" (Tr. 463, 623.) Corporal Reich and Schnasa said that it was the Sheriff's Department. (Tr. 540.) Deputy Schnasa shined his flashlight on his badge. (Tr. 624.) Corporal Reich shined his flashlight over his uniform. (Tr. 540.)

Either immediately before or after the curtains shut, Deering said words to the effect of "Goddamn Sheriff's Department." (Tr. 541, 623-624.)

The curtains then parted again, and Deputy Schnasa

heard rustling behind the door and heard the ping of something hit the window. (Tr. 624.) Deputy Schnasa observed four inches of a the barrel of a long gun, which he assumed was a shotgun or rifle. (Tr. 624.) Corporal Reich also observed a barrel of a long gun between the curtains and heard the object click on the glass. (Tr. 541.) Deputy Schnasa and Corporal Reich yelled "gun." (Tr. 541, 626.)

Deputy Schnasa ran to the east to the squad cars and advised dispatch on the radio that Deering had a gun. (Tr. 630.) Deputy Wizner ran to the northwest corner of the house. (Tr. 366.) Corporal Reich ran in a northwesterly direction towards a big shed that was north of the house. (Tr. 542.)

From his location at northwest side of the house, Deputy Wizner shined his flashlight on Deering two or three times and observed that Deering was standing partially in the doorway with a gun. (Tr. 360.) Each time that Deputy Wizner shined his light on Deering, Deering pointed a gun at him. (Tr. 360.) Deputy Wizner told Deering to "drop the gun." (Tr. 370.) On one occasion when Deputy Wizner ducked behind the house, Deputy Wizner observed that Deering moved away from the house and into the yard. (Tr. 370-371.) Deputy Wizner shined his flashlight on Deering and yelled at Deering to drop his gun. (Tr. 388.) Deering then stopped, turned and fired a shot in the direction of Deputy Wizner. (Tr. 388-389.)

Deputy Wizner believed that he had been hit. (Tr. 396.) Deputy Wizner then got up and ran to the area where the squad cars were located. (Tr. 392.)

Corporal Reich heard Deputy Wizner yell at Deering to put down his weapon. (Tr. 545.) Corporal Reich saw a bright

orange flash and heard a noise that sounded like a shotgun. (Tr. 542-543.) Reich saw a flashlight in Deputy Wizner's position go down, and then back up. (Tr. 544.) Corporal Reich believed that Deputy Wizner had been shot. (Tr. 544-545.) In fact, Deputy Wizner had not been hit.

When the shot was fired, Corporal Reich could not see Deering. (Tr. 543.) Reich moved forward a couple of steps to get Deering in his sight, and Reich saw Deering in the lighted area of the yard. (Tr. 543-544.)

Corporal Reich illuminated Deering with a flashlight. (Tr. 543-544.) Corporal Reich saw that Deering was facing him with a long gun at his (Deering's) shoulder, bringing it up into a firing position, pointed at Reich. (Tr. 503, 546.) Reich saw that Deering's body was bladed, meaning that Deering's left hip was pointed in Reich's direction. (Tr. 546.) Reich yelled at Deering to put the gun down. (Tr. 545.) Reich believed that his life was in danger. (Tr. 547.) Reich dropped his flashlight and fired at Deering, believing that Deering was going to fire and kill him. (Tr. 519, 547.) Deering was killed.[5]

REASONS FOR DENYING THE WRIT

The Petitioner has alleged that the Petition should be granted because (1) the decision of the Seventh Circuit is in

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5 Respondent objects to the Petitioner's pejorative factual assertion that Deering was "shot in the back." Testimony at trial from an expert forensic pathologist indicated that Deering's wounds were consistent with a position in which he was aiming a shot gun at Reich at the time he was shot. (R. 177, Transcript of testimony of Dr. Virginia Greenbaum at pp. 42-43).

conflict with this Court's decision in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); and (2) the decision of the Seventh Circuit creates or exacerbates a conflict among the circuits regarding evidence relevant to an examination of the totality of the circumstances in a Fourth Amendment "unreasonable use of force" case. Neither position has merit.

In fact, the Seventh Circuit took the precise positions on the law advocated by the Petitioner, but held that any errors committed by the District Court at trial were *harmless* under the unique factual circumstances of this case. The Seventh Circuit's decision is therefore dependent on the unique facts in this case, rendering Supreme Court review unnecessary and inappropriate.

As an initial matter, the Respondent must make clear that he does not agree with several rulings made by the Seventh Circuit. As argued before the Seventh Circuit, the Respondent believes that the District Court's decision not to permit testimony regarding the misdemeanor nature of the crime with which Deering was charged was not an abuse of discretion and was consistent with the applicable law. Similarly, Respondent believes that the District Court's jury instruction regarding the irrelevancy of the reasons for the issuance of the arrest warrant was consistent with applicable law. If the Petition for Writ of Certiorari were to be *granted*, Respondent reserves the right to once again make these arguments.

However, Respondent's disagreement with these aspects of the Seventh Circuit's decision do not impact the question of whether this case is appropriate for the issuance of a Writ of Certiorari. For the following reasons, it is requested

that the Writ be denied.

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT

The Petitioner correctly observes that excessive force claims, including deadly force claims, resulting from a seizure are analyzed under the Fourth Amendment's objective reasonableness standard. *Graham*, 490 U.S. at 396. This standard requires a balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). The question is whether the "totality of the circumstances" justify the particular type of seizure involved. *Tennessee v. Garner*, 471 U.S. at 8-9.

The Petitioner goes on to argue that the misdemeanor nature of the crime underlying the arrest warrant forms a part of the "totality of the circumstances" surrounding the seizure of Deering. Where the Petitioner's argument goes awry in its characterization of what the Seventh Circuit's decision *actually held*. In fact, the Seventh Circuit agreed with the Petitioner's position on this question.

Reading the Petition, one might get the impression that the Seventh Circuit must have *agreed* with the District Court's position that the misdemeanor nature of the warrant was not relevant to assessing the totality of the circumstances. Just the opposite is true. The Seventh Circuit held that such information was in fact relevant:

> These cases -- and others too numerous to relate -- mean that what Deputy Reich knew at the time – about Deering, his crime, and the warrant, and the perception of the danger he and the other deputies were in – were relevant to the evaluation of the reasonableness of his conduct.

Deering, 183 F.3d at 652.

This is precisely the position on the law advocated by the Petitioner. The Seventh Circuit held that the misdemeanor nature of Deering's crime formed a part of the totality of the circumstances, and the court clearly disagreed with the District Court's decision not to permit testimony regarding the misdemeanor nature of the arrest warrant:

> It is troubling to us that the instructions and the evidentiary rulings take a rather restrictive view of what constitutes the totality of the circumstances.

Deering, 183 F.3d at 649.

In so doing, the Seventh Circuit clarified that "pre-seizure" information known to an officer is relevant to an assessment of the reasonableness of his or her conduct. Despite its disagreement with the District Court's ruling, the Seventh Circuit held that in the *unique factual circumstances of this case*, the District Court's "restrictive" rulings did not warrant a new trial because the jury was permitted to hear sufficient evidence to make the reasonableness determination:

> Despite that [evidentiary ruling], however, the jurors heard evidence about the incident with the motorcycle, which would allow them to understand that the deputies were not looking for a serial murderer when they went to the farmhouse. The jury also heard testimony regarding how the deputies approached the house, how dark it was, what Deering's response was. They were allowed to hear sufficient information about the situation. Because the jury knew in general about the totality of the circumstances, the fact that they did not hear that the warrant was based on a misdemeanor is not reversible error – though we fail to see why this fact was kept from the jury.

Deering, 183 F.3d at 652 (emphasis added).

There is consequently no conflict between the Seventh Circuit's decision and the reasonableness test established in *Graham* and *Tennessee v. Garner*. The Seventh Circuit held that the jury should be permitted to assess the totality of the circumstances known to the officer at the time of the seizure. This holding is entirely consistent with applicable Supreme Court precedent. The court's determination that the evidentiary ruling did not require a new trial was based entirely on the unique factual circumstances of this case and the court's thorough assessment of the evidence that was actually admitted.

In reality, the Petitioner's disagreement with the Seventh Circuit stems not from the court's holdings on questions of constitutional law, but with the court's assessment of the evidence. The fact that the contested holding involves a case-specific assessment of the totality of the evidence admitted at trial renders this case inappropriate for review by the Supreme Court.

The same is true of the Seventh Circuit's holding with respect to the contested jury instruction. Contained within lengthy jury instructions was the brief statement that the "reasons for issuing the warrant for Reinhold Deering's arrest are irrelevant." Based on the applicable "totality of the circumstances" test, the Seventh Circuit held that this instruction was not proper. *Deering*, 183 F.3d at 653. However, the Seventh Circuit correctly noted that in determining whether a new trial was warranted, it must not view this instruction in isolation. The court is required to consider "the instructions as a whole, ... the opening statements, the evidence, and the closing argument to determine if the jury was adequately informed of the applicable law." *Smith v. Chesapeake & Ohio Ry. Co.*, 778 F.2d 384, 387-388 (7th Cir. 1985), cited in *Deering*, 183 F.3d at 653.

Considering the jury instructions as a whole, the Seventh Circuit held that the jury was *properly instructed* regarding the applicable law when told to consider "all the circumstances and the information available to the officer at the time." *Deering*, 183 F.3d at 653. The District Court's "misstatement," taken in context of the jury instructions as a whole, was held not to require a new trial. *Deering*, 183 F.3d at 653.

Once again, there is no conflict between the Seventh Circuit's holding on the jury instruction issue and any applicable principle of constitutional law. The contested holding is based on the court's case-specific assessment of the jury instructions that were actually given by the District Court. Such a holding is bound up with the unique facts of this case and does not require review by the Supreme Court.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CREATE A CONFLICT BETWEEN THE CIRCUITS.

Petitioner next argues that there exists a conflict among the circuit courts as to whether all facts and circumstances known to an officer regarding a plaintiff, including facts learned prior to the actual seizure, should be relevant to an assessment of reasonableness of a seizure. Petitioner relies on statements made in Abraham v. Raso, 183 F.3d 279 (3rd Cir. 1999), in contending that a conflict exists. In reality, the cases with which the Abraham court purported to disagree are distinguishable, and there is no conflict among the circuits on this issue and no need for the Supreme Court to clarify the law.

In the instant case, the Seventh Circuit held that "what Deputy Reich knew at the time – about Deering, his crime, and the warrant" were relevant to the evaluation of the reasonableness of his conduct. *Deering*, 183 F.3d at 652. The Seventh Circuit took the position that in assessing the reasonableness of a seizure under the Fourth Amendment, the trier of fact must consider "a number of factors known to the officers at the time [of the seizure]." *Deering*, 183 F.3d at 651. Stated another way:

> The totality of the circumstances cannot be limited to the precise moment when Deering discharged his weapon.

Deering, 183 F.3d at 649.

A similar conclusion was reached by the Third Circuit in *Abraham*, in which it was held as follows:

> 'Totality' is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force.

Abraham, 183 F.3d at 291.

These formulations of the rule are consistent with the holding of this court that the question is "whether the totality of the circumstances justifie[s] a particular sort of seizure." *Tennessee v. Garner*, 471 U.S. at 8-9; *Graham*, 490 U.S. at 396.

In reaching its conclusion, the *Abraham* court purported to disagree with *Bella v. Chamberlain*, 24 F.3d 1251 (10th Cir. 1994), and *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993).[6] The Third Circuit characterized the holdings in these cases as precluding the consideration of "pre-seizure conduct" in assessing the reasonableness of seizures under the Fourth

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6 The *Abraham* court also purported to disagree with *Carter v. Buscher*, 973 F.2d 1328 (7th Cir. 1992). In deciding the present case, the Seventh Circuit explained and clarified its holding in Carter not to conflict with its holding in this matter. *Deering*, 183 F.3d at 650.

Amendment. *Abraham*, 183 F.3d at 291. A close reading of these cases reveals that they are entirely compatible with *Abraham* and the Seventh Circuit's holding in this case.

In *Bella*, the plaintiff was piloting a helicopter that was being pursued by law enforcement agents. During the course of the pursuit, an officer fired three rounds from a semiautomatic weapon at the plaintiff's helicopter, one of which struck the helicopter but did not disable it. *Bella*, 24 F.3d at 1253. Approximately an hour later, the plaintiff landed the helicopter, at which time he was taken into custody. *Id.*

Importantly, the plaintiff in *Bella* did *not* challenge the officer's conduct in effecting his arrest. *Bella*, 24 F.3d at 1256. The only actions of which the plaintiff complained were the firing of the weapon by the officer and the fact that the pursuing helicopter was flown dangerously close to his own during the pursuit. *Bella*, 24 F.3d at 1253.

The Tenth Circuit held that the actions of which the plaintiff complained did not amount to a "seizure" within the meaning of the Fourth Amendment.[7] *Bella*, 24 F.3d at 1256. Because the plaintiff had only alleged misconduct on the part of the officers for actions taken prior to the seizure (his arrest), and had not alleged that the seizure itself was unreasonable, the court held that his complaint *failed to state a claim* under the Fourth Amendment. *Bella*, 24 F.3d at 1256. In the absence of

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7 The *Bella* court relied on this Court's holding in *California v. Hodari D.*, 499 U.S. 621, 626-627, 111 S.Ct. 1547, 1550-1551, 113 L.Ed.2d 690 (1991), that a "seizure" occurs only when a fleeing person is physically touched by police or when he or she submits to a show of authority by police.

a challenge to the actual seizure, the court properly found it unnecessary to examine the events leading up to the seizure for reasonableness. *Bella*, 24 F.3d at 1256.

The holding in *Cole v. Bone* is to the same effect. In that case, plaintiff's decedent ("plaintiff") drove his truck through a toll booth and was subsequently pursued at high speed by numerous state troopers. In the course of the pursuit, several troopers attempted to slow plaintiff's vehicle by firing at the tires, executing a "rolling roadblock," establishing a stationary roadblock, and other means, none of which were successful in stopping the vehicle. *Cole*, 993 F.3d at 1330-1331. One trooper finally decided to use deadly force to stop the vehicle, and his shots into the truck struck and killed the plaintiff. *Cole*, 993 F.3d at 1331.

Plaintiff alleged that he was "seized," within the meaning of the Fourth Amendment, when troopers attempted to stop his vehicle by means of the rolling and stationary roadblocks. *Cole*, 993 F.2d at 1332. Relying on *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), the Eighth Circuit held that those actions *did not amount to a seizure*, and that the plaintiff was not "seized" until he was struck by the fatal shots. *Cole*, 993 F.2d at 1333.

As a consequence, the court held that plaintiff had *failed to state a claim* under the Fourth Amendment against those troopers who had not participated in the actual seizure. *Cole*, 993 F.2d at 1333. The court held that *in the absence of a cognizable "seizure,"* a court should not examine events leading up to the seizure for reasonableness under the Fourth Amendment. *Cole*, 993 F.2d at 1333. In other words, "pre-seizure conduct," if not followed by an actual seizure, does not

state a claim for relief under the Fourth Amendment.

Importantly, the *Cole* court went on to examine the reasonableness of the conduct of the officer who actually seized the plaintiff, and against whom a claim had been stated under the Fourth Amendment. In so doing, the court stated the applicable test for reasonableness as follows:

> In analyzing the reasonableness of Trooper Rice's decision to use deadly force, we examine the information that Rice possessed at the time of his decision.

Cole, 993 F.2d at 1333 (emphasis added).

The court went on to examine all information known to the officer that he learned throughout the entire course of his contact with the plaintiff. *Cole*, 993 F.2d at 1333-1334. The court's consideration of the reasonableness of the seizure was not limited to events occurring immediately prior to the seizure.

The holdings in *Bella* and *Cole* therefore stand for the proposition that in the absence of a "seizure," the court does not examine the conduct of officers for reasonableness under the Fourth Amendment. Simply stated, without a "seizure," the conduct of officers does not state a claim for relief under the Fourth Amendment. The relevant holdings in *Bella* and *Cole* dealt with whether a seizure had occurred in the first instance, not with whether a seizure, once accomplished, was reasonable under the totality of the circumstances. These cases are not in conflict with the holdings in *Deering*, *Abraham*, *Garner*, and

Graham,[8] that in assessing the reasonableness of a seizure, the totality of the circumstances known to the officer are relevant.

The statements of the *Abraham* court notwithstanding, there is no discernable conflict among the circuits on this issue and no need for the Supreme Court to accept certiorari of this matter.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CHARLES H. BOHL
Counsel of Record

NATHAN A. FISHBACH
JOHN P. SPECTOR
WHYTE HIRSCHBOECK DUDEK S.C.
111 East Wisconsin Avenue
Suite 2100
Milwaukee, WI 53202
(414) 273-2100
Counsel for Respondent

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8 See also *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994).